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STATE CAPITOL
PHOENIX, ARIZONA

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DEPARTMENT OF LAW OPINION NO. 76-3 (R-3) (R76-129)

REQUESTED BY: MAX HAWKINS
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QUESTION: May the Treasurer of the State of Arizona pay general fund warrants by utilizing cash made available from the special revenue funds and agency funds and, if so, would interest have to be paid by the General fund for the use of the money from the other two fund groupings?

ANSWER: See body of opinion.

At the outset, some basic legal doctrines should be noted. As a matter of general law, when a Legislature creates a special fund for a particular use or objective, the monies in that fund must be handled and spent in conformity with the terms of the statute. State ex rel. Conway v. Industrial Commission, 55 Ariz. 105, 99 P.2d 88 (1940). Thus, the fund must be applied only to the purpose for which it was created and should not be diverted to any other purpose. Daugherty v. Riley 1 Cal.2d 298, 34 P.2d 1005 (1934); State v. Lawson, 110 W. Va. 258, 157 S.E. 589 (1931). An obvious corollary to the foregoing rules is that monies in such a fund should not be transferred to any other fund. Carr v. Frohmiller, 47 Ariz. 430, 56 P.2d 644 (1936).

However, and as pointed out in the strong and lengthy dissent in the Carr case, supra, one of the cornerstones of the constitutional form of government is a recognition that the power to authorize and direct the expenditure of public money lies in the Legislature and the Legislature alone, except as may be limited or affirmatively vested elsewhere in the constitution.

Most of the cited cases dealing with the issues here in question involve situations where a state agency or officer (e.g., a state treasurer) attempts, sua sponte, to divert or transfer funds from one objective to another. Clearly, this involves encroachment by the executive branch of government upon the powers of the legislative branch, not to mention any constitutional prohibitions which may be involved.

In the question posed in this Opinion Request (i.e., R76-129), there is no indication whatsoever that any legislative amendments to overcome this impediment are contemplated. However, on March 30, 1976 (some 19 days after the Opinion Request letter was written), a majority of the Arizona House Appropriations Committee introduced H. B. 2433. The Legislation, in brief, seeks to amend "... any provision of law to the contrary..." to enable the State Treasurer to pay general fund warrants with monies he would transfer from the "... special revenue funds grouping..." or the "... trust and agency funds grouping..." It also provides for weekly reports by the treasurer and the repayment of such transferred funds "... upon receipt of adequate monies in the general fund..."

In the event that H. B. 2433 becomes law, then the area of inquiry may be narrowed somewhat. Rather than determining whether a state agency or state officer, acting without specific legislative instructions, has properly transferred funds, the crux becomes: May the State Treasurer, pursuant to legislative authority (e.g., H. B. 2433) transfer monies from the "special revenue funds grouping" and/or the "trust and agency funds grouping" into the general fund?

In this regard, it has been held that the legislature of a state has the power to transfer to a different fund or appropriate to a different purpose any surplus monies which may remain in a special fund after the purposes for which it was established are accomplished. Urban v. Riley, 21 Cal.2d 232, 131 P.2d 4 (1942); State ex rel. Caldwell v. Lee, 157 Fla. 733, 27 So.2d 84 (1946).

In the Lee case, supra, the Florida State Legislature authorized the state budget commission to determine what, if any, surpluses existed in the budgets of various state departments, boards, institutions and other agencies. If a surplus existed in an agency fund and the performance of its legal duties would not be otherwise impaired, a transfer of monies from that fund to the State Building Fund was authorized. The State Comptroller refused to recognize the transfers of the monies on his books although the State Treasurer had, pursuant to the law, credited certain "surplus" funds to the State Building Fund.

In upholding the transfers, the Florida Supreme Court held that the State Budget Commission could determine whether or not a surplus existed in any fund and could order a transfer at any time during the fiscal year. It acknowledged, however, that as a practical matter, the determination of whether or not a surplus existed would be easier to make at or near the end of a fiscal year.

The Court also held that the test to be used to determine whether or not a balance exists in any fund is whether or not it has a surplus after deducting such sums as will be required to perform its legal functions for the remainder of the fiscal year, for it was clear that the legislature did not intend that the normal functions of any agency should be hampered.

The act which authorized the transfer procedures contained two important provisos. First, if it appeared that any emergency were about to arise in any department or agency after a transfer of its funds had been made, the Budget Commission would immediately reimburse the budget fund from which the monies had been taken up to, but not in excess of the sums previously borrowed. Second, with regard to funds appropriated to match federal funds, and certain other funds (e.g., appropriations for contractual purposes which would be adversely affected by setting aside balances from them and transferring them), the Court held that those funds should not be included when ascertaining the balances remaining but that it would not be unlawful to use the funds so raised to assist in securing the buildings or facilities constructed by such appropriated funds. Moreover, it also observed that the law required that funds so raised should be appropriated, so far as practical, so that the agency from which the funds were drawn would be benefited by them.

A surplus, however, must be found to exist, for if no true surplus exists, none can be transferred. See Veterans of Foreign Wars of U.S. v. State, 36 Cal. App.3d 688, 111 Cal. Rptr. 750 (1974), holding unconstitutional legislative appropriations from the California Veterans' Farm and Home Building Fund of 1943 for the purpose of defraying county expenses of maintaining county veterans' services offices. In addition to rejecting the argument made that a surplus existed in the fund, the Court held that the appropriations amounted to a transfer that impaired vested contractual rights and resulted in the illegal application of monies to objects other than had been originally set.

On the other hand, it has also been held that whether or not the purpose for which a special fund was created has been fully accomplished, such a fund may be diverted by statute to

another and different purpose so long as it remains subject to the control of the legislature, particularly where the diversion or transfer is merely temporary. In Daugherty v. Riley, 1 Cal.2d 298, 34 P.2d 1005 (1934), the Supreme Court of California held unconstitutional the "bold taking" of monies from one fund for purposes of another fund with no provision for its repayment. In so doing, however, the Court recognized that the Legislature had the power to transfer a special fund reserve temporarily from one purpose to another where the transfer did not interfere with the objects for which the fund was created, the temporary transfer being deemed a loan from the special fund to be repaid as soon as replenishment funds become available.

To the same essential effect is the decision in State ex rel. Porterie v. Charity Hospital of Louisiana at New Orleans, 182 La. 268, 161 So. 606 (1935). It was there held that a statute which provided that, until the hospital in question obtained a contemplated federal loan, certain tax revenues previously dedicated to the hospital by statute should be paid to Louisiana State University did not deprive the hospital of such revenues for use in repaying the loan where it was clear from the terms of the statute that upon obtaining the loan, the tax revenues previously dedicated would immediately revert to the hospital. Nevertheless, a legislature cannot authorize the diversion of a special fund where such diversion would conflict with a provision of the constitution controlling such fund.

In Brye.v. Dale, 64 N.D. 41, 250 N.W. 99 (1933), the Court invalidated a transfer of monies from the constitutionally recognized state permanent hail surplus insurance fund to the state real estate bond interest payment fund, notwithstanding a contemplated repayment within six years and with interest. Among other reasons, the Court held that such a transfer would amount to an unconstitutional diversion of monies under Section 175 of the North Dakota constitution. That section provided:

> "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which [object] only it shall be applied."

The monies making up the hail fund were raised by the levy and collection of an acreage tax upon the tillable lands within the state. However, the tax did not take the form of a true ad valorem property tax; it was a flat tax of three cents per acre,per annum.

It was held in Hall v. Blan, 227 Ala. 64, 148 So. 601 (1933), that while funds devoted by a constitution to a specific purpose cannot be diverted or transferred to another purpose by the legislature, special funds raised by legislation and devoted to specific purposes are within the control of the legislature with regard to their objectives.

Furthermore such a transfer or diversion of a special fund has been held unlawful where it results in an impairment of the obligation contract. In Hubbell v. Leonard, 6 F.Supp. 145 (D.Ark. 1934), a state statute which authorized the state treasurer to divert the proceeds of automobile licenses and gasoline and motor oil taxes which had been previously irrevocably pledged for the payment of principal and interest on state highway bonds was unconstitutional as impairing the obligation of contract between the state and the bondholders.

Finally, a transfer of funds such as here under consideration will be illegal if it constitutes a breach of trust. In Re Statehouse Bonds, 19 R.I. 393, 33 A. 870 (1896). In this case, the Court held that neither the legislature nor any state officer could authorize the use of any of the proceeds from the sale of state bonds (issued to acquire land and erect thereon a new statehouse) above and beyond the sums anticipated to be used in a certain period for the purpose of paying the general expenses of the state during the same period, at the end of which time the regular income of the state would have been sufficient to repay the sums used.

Turning, therefore, to the specific terms of the Arizona Constitution, several provisions seem to be relevant. Article 9, Section 3, provides, inter alia:

> "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the tax, to which object only it shall be applied."

This constitutional provision has been interpreted by the Supreme Court of Arizona as applying only to property taxes and not to excise taxes. City of Glendale v. Betty, 45 Ariz. 327, 43 P.2d 206 (1935); Hunt v. Callaghan, 32 Ariz. 235, 257 P. 648 (1927). Both of these cases, however, involved additional, collateral issues not directly related to the question of whether, given a statute that expressly states the object to which revenues collected thereunder must be applied, an application or diversion of such funds to a different,

unrelated objective was proper. Thus, the specific question here under consideration has not been clearly decided by the Arizona Supreme Court.

On the other hand, the applicability of Article 9, Section 3, has been recognized in a case involving funds appropriated from the state general fund for a specific purpose (old age pensions) where a possibility of a reversion of the funds back to the general fund existed by virtue of a separate general appropriation. Carr v. Frohmiller, supra.

In the Carr decision, supra, the Arizona Supreme Court stated, 47 Ariz. at 441-442:

> "The pension money was levied and collected for the specific purpose and object of paying pensions and burial expenses of deceased pensioners. The administrative and executive officers of the state have collected such funds under a mandate of the legislature, and under our Constitution such funds cannot be expended for any other purpose.
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> "While no doubt the legislature has the power and right to dispose of any balance left in the state treasury after the objects and purposes for which the taxes were levied and collected have been satisfied, and may direct that such balance be turned into the general fund, there is a real, serious, fundamental objection to the legislature's levying and collecting taxes for a specific object and purpose and then prohibiting its expenditure for that purpose and letting it revert to the general fund."

It should be noted with regard to the Carr decision, supra, that it involved a question of the reversion of monies from one fund into another rather than a transfer. Furthermore, the majority opinion was accompanied by a long and vigorous dissent. Nonetheless, while it is true that the appropriation upheld under the Carr case, supra, involved monies ultimately generated by a property tax levy (cf. Brye v. Dale, supra),

the reasoning given by the Court with regard to the application of tax monies only to such objectives as were given when the monies were collected is relevant to the instant question.

In addition, Article 9, Section 4, of the Arizona Constitution provides, inter alia:

> "Whenever the expenses of any fiscal year shall exceed the income, the Legislature may provide for levying a tax for the ensuing fiscal year sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of the ensuing fiscal year."

It is therefore evident that the framers of the Arizona Constitution foresaw the possibility of fiscal year expenditures exceeding income and provided a vehicle whereby the Legislature could remedy the situation. The workings of this provision (as well as procedures similar to the issuance of treasurer's warrant notes under A.R.S. § 35-185) are discussed in In re Valley Bank of Phoenix, 14 Ariz. 133, 125 P.704 (1912). And a discussion of similar constitutional provisions in the States of Washington and Oklahoma is made in State ex rel Troy v. Yelle, 36 Wash.2d 1972, 217 P.2d 337 (1950), cited in Arizona Attorney General Opinion 76-111, infra.

Interestingly enough, the court in the Valley Bank of Phoenix case, supra, interpreted the provisions of Senate Bill 29 (Ch. 19, Laws 1912, First Special Session) as requiring that monies in the general fund and in all funds other than the general fund were to be kept separate and inviolate, with no transfers between or among the funds allowed except as expressly authorized and directed by law. As authority for this position, the court cited (14 Ariz. at 134) the prohibition contained in Article 9, Section 3, discussed supra.

Article 9, Section 5, of the Arizona Constitution provides, inter alia:

> "The State may contract debts to supply the casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more laws, or at different periods of time, shall never exceed the sum of three hundred and fifty thousand dollars ..."

In this regard, reference should be made to Attorney General Opinion R76-111. In brief, that opinion holds that the Arizona Constitution's $350,000 debt limitation provision (Article 9, §5) does apply to state tax anticipation bonds (A.R.S. § § 35-401 - 35-408) but does not apply to state treasurer's warrant notes (A.R.S. § 35-185).

This opinion includes a discussion of the Arizona Supreme Court's recent decision in Rochlin v. State, 112 Ariz. 171, 540 P.2d 643 (1975). It was there held, 540 P.2d at 647-648, that:

> "A debt in the constitutional sense arises when the State or a political subdivision borrows money. This obligation created by the loan of money is usually evidenced by a bond, but can be created by the issuance of paper bearing a different label. State ex rel Wittler v. Yelle, 65 Wash.2d 660, 399 P.2d 319 (1965).
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> "We believe that [Article 9] Section 5 was meant to apply to borrowing money for the operation of state government."

The holding in the Rochlin decision, supra, ruled that significant differences existed between the debt limitation language of Article 9, Section 5 (state limitation), and Article 9, Section 8 (political subdivisions limitation), and that therefore cases cited which construed the latter were not authority for the construction of the former. Thus, the court distinguished the decision in City of Phoenix v. Phoenix Civic Auditorium and Convention Center Association, 99 Ariz. 270, 408 P.2d 818 (1965), which in turn, cites (99 Ariz. at 289) Nelson v. Wilson, 81 Mont. 560, 264 P. 679 (1928), defining the term "debt" in a broad fashion.

The Court in the Rochlin decision, supra, stated that Article 9, Section 5, of the Arizona Constitution was taken from Ohio and several other states, and was nearly identical to Article 8, Section 1, of the Washington Constitution. It should be noted in passing, however, that in 1972, the State of Washington adopted Amendment 60 to its Constitution, which amendment substantially altered the definitions and debt limitation provisions of that section.

Attorney General Opinion R76-111, therefore, holds that the issuance of treasurer's warrant notes does not constitute the borrowing of money and thus does not create a "debt" within the meaning of Article 9, Section 5. In this regard, cf. State ex rel. Ross v. Donahey, 93 O.S. 414, 113 N.E. 263 (1916), holding that the term "debt" within Article VIII, Section 1 of the Ohio Constitution (see Rochlin v. State, supra, 540 P.2d at 647) had no reference to the necessary and everyday current expenses of the sovereign government itself.

One other Attorney General Opinion construing Article 9, Section 5, may be informative: A.G.Op. 68-6. That opinion holds that the State Treasurer could not advance (i.e., loan) monies to the Arizona Civil Rights Commission to cover a thirty-day time lapse between the time certain employees' salaries were due and receipt of monies from the federal government under a contract. The opinion also discusses the duties of the State Treasurer in this regard and holds that salary claims incurred when funds were not available must be treated as unauthorized obligations.

Another provision of the Arizona Constitution bearing upon the resolution of this question is Article 9, Section 14, which places strict limitations upon the uses to which revenues derived from motor vehicle and fuel taxes may be put. Although it has been opined by the Office of the Attorney General that intra-budget unit transfers of funds are in certain limited instances permitted (Atty. Gen. Op. 69-4), it would appear that any contemplated transfer of funds which involved monies subject to the restrictions of Article 9, Section 14, would be unconstitutional. See Hubbell v. Leonard, supra.

Finally, Section 28, of the Arizona Enabling Act and Article 10, Section 7, of the Arizona Constitution place mandatory restrictions upon revenues received from lands granted to the State of Arizona and specifically provide that a separate fund shall be established for each of the several objects for which the said grants are made. Furthermore, whenever any monies are in any manner derived from such lands, they are required to be deposited by the State Treasurer in the fund corresponding to the grant under which the particular land generating such revenue was, by the Enabling Act, conveyed or confirmed. Both provisions also specifically provide that no money shall ever be taken from one fund for deposit in any other or for application to any object other than that for which the land producing the same was granted or confirmed.

When the foregoing principles and doctrines are applied to the fact situation as posed in the Opinion Request (i.e.,

R76-129) and in H. B. 2433, several significant problems seem to appear.

For example, both the opinion request and the proposed legislation seem to contemplate the payment of general fund warrants by using undifferentiated cash sums transferred from either the "special funds" grouping or the "agency funds" grouping. No attempt would be made, apparently, to distinguish the precise source of the monies from within the grouping. For example, monies transferred to the general fund from the "agency funds" grouping would appear to be on a lump sum basis rather than on a pro-rata, proportional basis allocable to each separate agency fund account within the said grouping.

Even assuming that a pro-rata allocation could be computed, it would still require an account-by-account analysis to determine whether or not, for example, restrictions upon the purposes to which the monies may be applied exist. If, for instance, the treasurer were possessed of monies in an account which were required by federal law to be used in a particular way only, the transfer of even a pro-rata share of that account might constitute either a breach of trust or impairment of contract. Cf. Navajo Tribe v. Arizona Department of Administration, 111 Ariz. 279, 528 P.2d 623 (1974).

In this regard, and by way of further example, there seems to be no provision for immediate reimbursement of the fund from which revenues were transferred in the event of an emergency in that fund. See State ex rel. Caldwell v. Lee, supra. Moreover, with regard to H. B. 2433, it is the general rule that a special and particular statute is not repealed by a general statute unless the intent to repeal is manifestly evident. Shapley v. Frohmiller, 64 Ariz. 35, 165 P.2d 306 (1946). The use of the phrase "... notwithstanding any provision of law to the contrary..." in H. B. 2433 seems to have as its objective the repeal, or at the least the amendment, of the many statutes now in force governing the collection and disposition of the monies in the separate individual funds which comprise, in the aggregate, the "special revenue funds grouping" and the "trust and agency funds grouping."

One possible alternative to the proposal as it now stands would involve an account-by-account analysis to determine whether or not any constitutional or contractual limitations would prohibit a transfer of all or a portion of such monies. If no such limitations appeared, there would be no legal impediments to a specific transfer of such monies. As a practical matter, however, it may well be impossible to generate enough

revenue in this manner and still insure the fulfillment of a particular agency's or department's legal duties. See, e.g., State ex rel. Caldwell v. Lee, supra.

In summary, several points are apparent:

1. Transfers of funds cannot be authorized where such a transfer conflicts with a constitutional provision;

2. Funds devoted to a specific purpose by the constitution cannot, in the absence of an amendment to the constitution, be transferred to another purpose by the Legislature.

3. Funds cannot be transferred if the transfer will result in an impairment of a contractual obligation;

4. Funds cannot be transferred if the transfer would constitute a breach of trust;

5. Funds which are restricted in their use by applicable federal legislation cannot be transferred;

6. Assuming that none of the foregoing limitations are applicable, any transfer of funds must be made pursuant to specific legislative authorization.

In conclusion, while there is legal authority on both sides of the issue, it is evident from the cases that a determination of the propriety of a transfer of funds such as is here contemplated depends in large measure upon the individual facts and circumstances surrounding the proposal. While the facts as posed by Opinion Request R76-129 and H. B. 2433 seem to possess several aspects favoring a positive answer, other aspects seem to require a negative answer. And, unless the proposals were free from all or substantially all material legal doubt, it would not be possible for this office to sanction the proposal.

It is therefore the opinion of this office that,based upon the foregoing cases and principles, as well as the facts as presented, it would not be legal for the State Treasurer to transfer undifferentiated monies from either the "special revenue

funds grouping" or the "trust and agency funds grouping" to the general fund for purposes of paying general fund warrants because such a transfer might violate constitutional provisions, federal statutes or private legal rights. However, if an analysis of the individual accounts comprising either of the funds groupings could identify monies which were free from the restrictions discussed above, legislation could be drafted authorizing the transfer on the basis of a determination that the transfer is necessary to meet current government obligations and that surplus funds exist above and beyond those needed to carry out the objectives for which the account was created.

Sincerely,

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